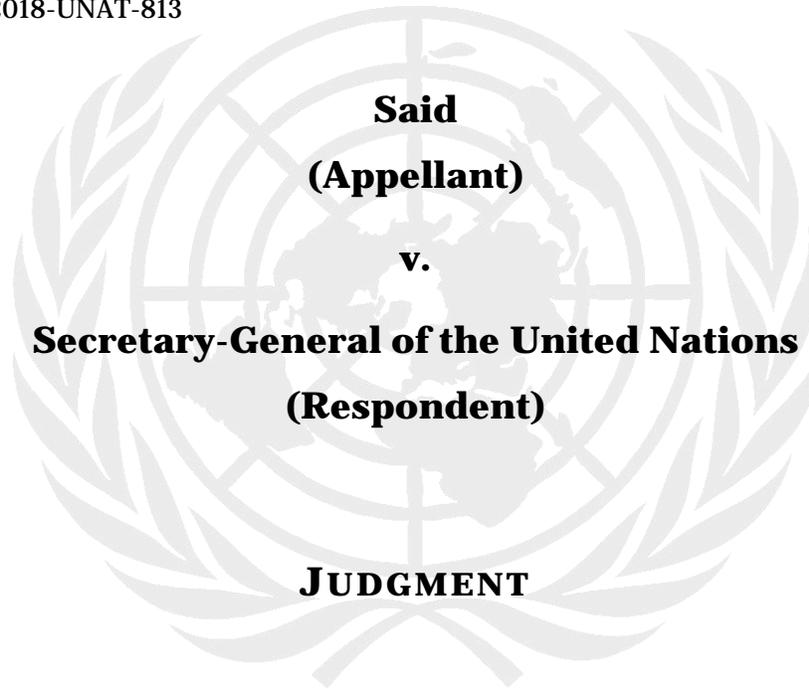




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-813



**Said
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge John Murphy Judge Martha Halfeld
Case No.:	2017-1101
Date:	22 March 2018
Registrar:	Weicheng Lin

Counsel for Mr. Said:	Nicholas C. Christonikos
Counsel for Secretary-General:	Patrick Killebrew

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/041, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 12 June 2017, in the case of *Said v. Secretary-General of the United Nations*. Mr. Zedan H. A. Said filed the appeal on 9 August 2017 and the Secretary-General filed an answer on 9 October 2017.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant entered into service of the United Nations as a National Security Guard with [the United Nations Truce Supervision Organization (UNTSO)], in Jerusalem, in June 1982 at the G[S]-2 level. In 1987, he was promoted to the G[S]-3 level.

... On 27 July 2004, the Applicant was made the supervisor for National Security Officers at UNTSO.

... In October 2004, all UNTSO security posts were reviewed. Following the review, the Applicant's functions as supervisor for National Security Officers was slated for reclassification.

... In January 2007, the reclassification of the post of National Security Sergeant was approved at the G[S]-5 level effective 1 September 2006.

... UNTSO advertised the newly reclassified post on 16 January 2007. The Applicant applied and was shortlisted.

... On 19 February 2007, the Applicant wrote to the UNTSO Chief of Staff, claiming that he had been deprived of the newly reclassified Security Sergeant position and that he should be appointed to the position outside the regular process. On 22 February 2007, the Officer in Charge of the Civilian Personnel Section responded and explained that the newly reclassified position had to be advertised in accordance with section 4 of [Administrative Instruction] ST/AI/1998/9 [(System for classification of posts)], and attached a copy of the classification notice received from the Office of Human Resources Management (OHRM).

... On 28 February 2007, before the recruitment process for the Security Sergeant position was completed, the Applicant retired and separated from service. UNTSO exceptionally processed the Applicant's application and considered him for the vacancy.

¹ Impugned Judgment, paras. 4-17.

... The recruitment process was completed on 8 July 2007. The Applicant was selected for the position, but recommended for promotion to the G[S]-4 level because the rules in force at the time did not allow for promotion by two grades higher than that encumbered by a staff member.

... On 31 October 2007, he was notified of his retroactive promotion to the G[S]-4 level from 1 September 2006 through to his retirement on 28 February 2007. On 6 November 2007, a “Promotion through Reclassification” Personnel Action was raised and the Applicant was paid salary adjustments to reflect the retroactive promotion.

... The Applicant wrote to the UNTSO Chief Human Resources Officer (CHRO) on 20 April 2015 requesting a copy of the official classification notice and information necessary to make a classification appeal. On 6 May 2015, the UNTSO CHRO replied. She reiterated that UNTSO and [OHRM] had agreed that the effective date for the classification for all general service posts was 1 September 2006 and noted that the Applicant had been promoted to the G[S]-4 level on an exceptional basis after his retirement.

... On 23 December 2015, the Applicant wrote to the Under-Secretary-General, [Department of Field Support (DFS)], stating that he did not receive the classification notice until 23 September 2015. He claimed that he was entitled to be paid at the G[S]-5 level for two and a half years prior to his retirement.

... On 16 May 2016, the Applicant received an email from the Director, [Field Personnel Division (FPD)]. The reply referred to the 6 May 2015 letter as a comprehensive response to the Applicant’s requests and stated that there was no basis for further review or action.

... On 15 June 2016, the Applicant requested management evaluation of the 16 May 2016 email.

... Following the filing of this Application on 3 November 2016, the Applicant filed a motion for this matter to be transferred so that it [would be] heard and determined at the [UNDT] in New York.

3. On 3 November 2016, Mr. Said filed an application with the UNDT in Nairobi challenging the contents of the e-mail dated 16 May 2016, from the Director, FPD, DFS, in which Mr. Said was informed that his requests for compensation at the GS-5 level, prior to his retirement from UNTSO on 28 February 2007, would not be reviewed any further.

4. On 12 June 2017, the UNDT issued Judgment No. UNDT/2017/041, rejecting Mr. Said’s application as not receivable. The UNDT found that Mr. Said’s claim that he should have been promoted to the GS-5 level should have been made at the time he received the formal notification

of his retroactive promotion in October/November 2007, which he failed to do. Mr. Said also did not challenge the Administration's letter dated 6 May 2015. The UNDT concluded that the response from the Director, FPD, DFS dated 16 May 2016 was merely a reiteration of the previous decisions and correspondence received by Mr. Said and that therefore, his application was not receivable.

5. On 9 August 2017, Mr. Zaid appealed the UNDT Judgment to the Appeals Tribunal and the Secretary-General answered on 9 October 2017.

Submissions

Mr. Said's Appeal

6. Mr. Said requests compensation for underpayment of salary in the form of a monetary equivalent of Special Post Allowance (SPA), retroactive from the date of his assignment as supervisor of the National Security Officers on 27 July 2004. He claims that the UNDT misconstrued his application when considering "that [he] contend[ed] that he should have been promoted to the higher GS-5 level (with financial compensation in that form) and that he should have but did not challenge the decision to retroactively promote him to GS-4 when he was notified of that decision in October/November 2007". He contends that "the question of promotion to the GS-5 level and the decision to promote him to the GS-4 level are not and never were issues contended by [him]". Rather, "[t]he issue in this case is [his] request for financial compensation for services rendered in a post classified at a higher level, as fully documented and lawfully classified by a job assessment conducted prior to his retirement". The UNDT therefore erred in fact resulting in a manifestly unreasonable decision.

7. Mr. Said further claims that the UNDT failed to exercise the jurisdiction vested in it when it failed to order the production of documents or such other evidence to establish that he had been properly served the document on 22 February 2007. By his application to the UNDT, he contended that he did not receive the document he needed as sufficient evidence to claim financial compensation for services rendered in a post classified at a higher level. In light of the parties' opposing statements of fact on this point, the UNDT should have deemed necessary the production of documents or such evidence that Mr. Said was properly served the document on 22 February 2007. However, it failed to exercise this jurisdiction vested in it and considered the

Secretary-General's unproven contention to be true. The Secretary-General should now on appeal produce this evidence, or the Appeals Tribunal may order the production of this evidence.

8. Mr. Said asks that the Appeals Tribunal reverse the UNDT Judgment, assess the merits of his case, order the rescission of the contested administrative decision, and grant the relief requested in his application. In the alternative, he requests that the Appeals Tribunal remand the case to the UNDT for further consideration. In case of a remand, he reiterates his request for a change of venue and for leave to testify before the UNDT.

The Secretary-General's Answer

9. The UNDT correctly concluded that Mr. Said's application was not receivable. Mr. Said only sought management evaluation nine years after his retroactive promotion to the GS-4 level and after he received the May 2016 e-mail by which he was informed that there would be no further review of his request for compensation at the GS-5 level. The May 2016 e-mail was merely a reiteration of the previous decision communicated to Mr. Said more than a year earlier refusing to reconsider the level of his promotion in 2007. In accordance with the Appeals Tribunal's jurisprudence, the UNDT held that it has no jurisdiction to waive the deadlines for management evaluation and that merely confirmative decisions cannot be appealed. The UNDT therefore correctly concluded that Mr. Said's application was not receivable.

10. Mr. Said has not established any errors by the UNDT warranting a reversal of the UNDT Judgment. Mr. Said is merely rearguing his case and has not established any errors by the UNDT. He has therefore failed to satisfy the requirements of Article 2(1) of the Appeals Tribunal Statute.

11. Mr. Said's contention that the UNDT failed to exercise the jurisdiction vested in it when it failed to order the production of documents or such other evidence to establish that Mr. Said had been properly served the document on 22 February 2007 is without merit. In the present case, Mr. Said had been formally notified of his retroactive promotion to the GS-4 level on 31 October 2007 and had received a Personnel Action to that effect on 6 November 2007. He was also paid salary adjustments to reflect the retroactive promotion to the GS-4 level. He therefore could have filed a challenge in 2007, but failed to do so. Mr. Said has not demonstrated that the UNDT failed to exercise jurisdiction vested in it.

12. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

Considerations

13. The issue before this Tribunal is whether the UNDT correctly concluded that Mr. Said's application was non-receivable *ratione materiae*. This Tribunal determines that the Dispute Tribunal's conclusion is correct for the reasons below.

14. At the outset, we recall that "the key characteristic of an administrative decision subject to judicial review is that the decision must 'produce[] direct legal consequences' affecting a staff member's terms and conditions of appointment".² Further, "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine".³

15. "The Appeals Tribunal has consistently held that the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather time starts to run from the date on which the original decision was made".⁴ For this reason, a staff member cannot reset the time for management evaluation by asking for a confirmation of an administration decision that has been communicated to him earlier. Neither can a staff member unilaterally determine the date of an administrative decision.⁵

² *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 28, citing *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, in turn citing former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V and *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, para. 17.

³ *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 28 citing *Rabee v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-296, in turn citing *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273.

⁴ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, citing *Samuel Thambiah v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-385, *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275 and *Sethia v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-079;

⁵ *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 31, citing *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, citing in turn *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273.

16. In the present case, as per the documents on file, the Appellant wrote to the UNTSO CHRO on 20 April 2015 requesting a copy of the official classification notice and information necessary to make a classification appeal. On 6 May 2015, the UNTSO CHRO replied. She reiterated that UNTSO and OHRM had agreed that the effective date for the classification for all general service posts was 1 September 2006 and noted that the Appellant had been promoted to the GS-4 level on an exceptional basis after his retirement. Moreover, in the aforementioned reply it was noted, *inter alia*, that:

1. Reference is made to your letter dated 20 April 2015 in which you stated that you did not receive a copy of the classification notice for the post you were encumbering prior to your retirement, and that you did not receive responses neither from [the] UNTSO Administration nor from UNHQ, New York to your multiple follow-up letters.

2. We have conducted a thorough review of your file (hence the delayed response to you) and noted that on 22 February 2007, Ms. Gertrude Mwendah, Officer-in-Charge (OiC) of Personnel Section, responded by memorandum and provided you a copy of the approved and signed classification document, for your records (**see Annex I**) and at [the] same time responded to the concerns raised by you in several communications (**see Annex II**) from you to UNTSO Management, and you acknowledged receipt of it on 27 February 2007, thanking her for clarifying your queries in a prompt manner (**see Annex III**).

17. The Appellant never challenged the UNTSO CHRO's response of 6 May 2015, by requesting management evaluation of it and then taking his case to the UNDT. It is settled case law that requesting management evaluation is a mandatory first step in the appeal process.⁶ The Appeals Tribunal has noted many times that the requirement of management evaluation assures that there is an opportunity to quickly resolve a staff member's complaint or dispute without the need for judicial intervention.⁷ Neither the Dispute Tribunal nor the Appeals Tribunal has jurisdiction to waive deadlines for the filing of requests for management evaluation or to grant any exceptions to it as it is a mandatory requirement pursuant to the Staff Rules.⁸

⁶ *Faye v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-654, para. 31; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-293, para. 27.

⁷ *Vukasović v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-699, para. 13, citing *Amany v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-521, para. 17, in turn citing *Servas v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-349, para. 22 and citations therein.

⁸ *Faust v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-695, para. 40, citing *Eggesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-402, para. 23 and citations therein.

18. However, nearly eight months later, on 23 December 2015, the Appellant wrote to the Under-Secretary-General, DFS stating that he did not receive the classification notice until 23 September 2015. He claimed that he was entitled to be paid at the GS-5 level for two and a half years prior to his retirement. Thereupon, on 16 May 2016, the Appellant received an e-mail from the Director, FPD which referred to the 6 May 2015 letter as a comprehensive response to the Appellant's requests and stated that there was no basis for further review or action. The specific Administration's response, embodied in the e-mail of 16 May 2016, was the subject of the Appellant's request for management evaluation on 15 June 2016, as well as his application filed with the UNDT in Nairobi on 3 November 2016.

19. The Appellant submits, *inter alia*, that the UNDT misconstrued his application when holding that he was seeking a promotion to the higher GS-5 level (with financial compensation in that form), while the issue in this case was his request for financial compensation for services rendered in a post classified at a higher level, as fully documented and lawfully classified by a job assessment conducted prior to his retirement.

20. There is no merit in the Appellant's assertion. Having reviewed the relevant communication, the Appeals Tribunal holds that the UNTSO CHRO's response of 6 May 2015 to Mr. Said conveyed a clear and definitive administrative decision with direct legal consequences for him as to the core subject of this litigation, as is evident from his application to the UNDT of 3 November 2016, namely that he was entitled to be paid at the GS-5 level for two and a half years prior to his retirement and to the correction of the date of his promotion to the GS-4 level to 1 December 2005. Not only did the Administration, through this reply, maintain its earlier decision, taken on 8 July 2007 and notified to the Appellant on 31 October 2007, according to which the latter had been retroactively promoted to the GS-4 level from 1 September 2006 through to his retirement on 28 February 2007, but it also made a new decision, based on a new thorough review of the facts of the case, denying him the said claimed rights. Nevertheless, as already noted, this administrative decision has never been disputed by the Appellant.

21. Therefore, we find, albeit in part for different reasons, that the UNDT correctly concluded that the e-mail of 16 May 2016 from the Director, FPD, which referred to the 6 May 2015 letter as a comprehensive response to the Appellant's requests and stated that

there was no basis for further review or action was not challengeable before the UNDT.⁹ In our view, as discussed above, the e-mail of 16 May 2016 was only a confirmation of the 6 May 2015 response to Mr. Said and not, as the UNDT concluded, a “reiteration of the previous decisions and correspondence received by the App[ell]ant”.

22. For the foregoing reasons, we determine that the UNDT did not err in law or fact, resulting in a manifestly unreasonable decision, when it found that Mr. Said’s application was not receivable *ratione materiae*. Finally, since he did not challenge the original administrative decision of 6 May 2015 and instead brought a time-barred application against a subsequent communication of the Administration, there is no merit in the Appellant’s contention that the UNDT failed to exercise the jurisdiction vested in it when it failed to order the production of evidence to establish that he had been properly served the document on 22 February 2007.

⁹ Impugned Judgment, para. 31.

Judgment

23. The appeal is dismissed and Judgment No. UNDT/2017/041 is affirmed.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Halfeld

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar